MOKHTAR AMIN

v.

MOHAMED MOKTAR OMAR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: M-02-184-1998]
25 AUGUST 2001

CIVIL PROCEDURE: *Res judicata - Finality of earlier decision - Entry of default judgment on similar issue - Whether an abuse of process*

CIVIL PROCEDURE: *Service - Writ of summons - Service upon defendant in person and not upon solicitor - Whether an abuse of process - Whether duty of court to prevent abuse despite compliance of rules of court*

CIVIL PROCEDURE: *Rules of court - Service - Service upon litigant in person and not upon solicitor - Whether an abuse of process - Whether duty of court to prevent abuse despite compliance of rules of court*

CIVIL PROCEDURE: *Appearance - Default of appearance to writ - Governing provision - Rules of the High Court 1980, O. 13 r. 6*

This was the plaintiff's appeal against the decision of the learned judge who had allowed the defendant's application to set aside a judgment in default of appearance that the plaintiff had obtained against the defendant.

The issues were: (1) whether the plaintiff correctly proceeded under O. 13 r. 6 of the Rules of the High Court 1980 ('RHC') upon default of appearance to the writ; (2) whether service on the defendant in person was proper as the plaintiff was aware that the defendant was represented by solicitors; and (3) whether the doctrine of *res judicata* applied as the sale and purchase agreement (in respect of two pieces of land that the defendant agreed to sell to the plaintiff) which the plaintiff sought to enforce in this action was already determined by the High Court in the caveat proceedings brought by the defendant. The High Court therein held that the plaintiff had no caveatable interest in the said lands as the defendant had properly terminated the said agreement.

Held:
Per Gopal Sri Ram JCA

[1] The court agreed with the plaintiff's submission that O. 19 r. 7(1) RHC applies only to cases where there has been default in the delivery of a pleading whereas O. 13 r. 6 applies to cases where there has been default of appearance. However, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

[2] The rules of court countenance the service of process upon a litigant in person. But it does not follow that in every case where there is due observance of a rule of court no abuse of process may ensue. A rule of court like any other provision may be the subject of abuse and it is the function of the courts to be ever vigilant against this. The plaintiff, despite being aware that the defendant was represented by solicitors proceeded to serve the defendant personally. The plaintiff no doubt did what he did in order to steal a march on the defendant.

[3] The default judgment gave the plaintiff what he was certainly not entitled to have. The issue of the validity of the sale and purchase agreement had already been determined by the High Court in the caveat proceedings. It would appear that *prima facie* the defendant had a complete answer to the claim for specific relief by the plaintiff. The parties were bound by the doctrine of *res judicata* from re-agitating an issue that had already been resolved in earlier proceedings.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan plaintif terhadap keputusan hakim yang bijaksana yang telah membenarkan permohonan defendan untuk mengenepikan suatu penghakiman ingkar kehadiran yang telah diperolehi oleh plaintif terhadap defendan.

Isu-isunya adalah: (1) samada plaintif telah secara betul meneruskannya di bawah A. 13 k. 6 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') setelah ingkar kehadiran pada writ tersebut; (2) samada penyampaian ke atas defendan secara ke diri adalah wajar kerana plaintif mengetahui bahawa defendan telah diwakili oleh peguamcara; dan (3) samada doktrin *res judicata* terpakai kerana perjanjian jualbeli (berhubung dua bidang tanah yang telah defendan setujui untuk dijual kepada plaintif) yang cuba dikuatkuasakan oleh plaintif dalam tindakan ini telah pun ditentukan oleh Mahkamah Tinggi dalam prosiding kaveat yang dimulakan oleh defendan. Dalam prosiding itu, Mahkamah Tinggi

telah memutuskan bahawa plaintif tidak mempunyai kepentingan yang boleh dikaveatkan dalam tanah-tanah tersebut kerana defendan telah menamatkan perjanjian tersebut dengan sempurna.

Diputuskan:
Oleh Gopal Sri Ram JCA

[1] Mahkamah bersetuju dengan penghujahan plaintif bahawa A. 19 k. 7(1) KMT terpakai hanya kepada kes-kes di mana terdapatnya keingkaran dalam penyampaian sesuatu pliding sedangkan A. 13 k. 6 terpakai kepada kes-kes di mana telah berlaku keingkaran kehadiran. Walau bagaimanapun, ketidakpatuhan akan kehendak-kehendak prosedur tidak seharusnya dianggap sebagai mentaksahkan sebarang tindakan atau mengambil sebarang langkah di situ kecuali ianya menyebabkan suatu salah laksana keadilan.

[2] Kaedah-kaedah mahkamah memberi sokongan kepada penyampaian saman. Tetapi ianya tidak menyusuli bahawa di dalam setiap kes di mana telah berlaku pematuhan sesuatu undang-undang penyalahgunaan proses tidak berikutan. Kaedah mahkamah seperti sebarang peruntukan lain mungkin akan disalahgunakan dan ianya merupakan fungsi mahkamah untuk sentiasa berjaga-jaga terhadap perkara ini. Plaintif, meskipun mengetahui bahawa defendan diwakili oleh peguamcara telah meneruskan penyampaian kepada defendan secara ke diri. Plaintif tanpa diragui telah melakukan apa yang dilakukan olehnya untuk mengambil kesempatan terhadap defendan.

[3] Keingkaran kehakiman telah memberikan plaintif apa yang pasti ianya tidak berhak untuk perolehi. Isu kesahan perjanjian jualbeli telah pun ditentukan oleh Mahkamah Tinggi dalam prosiding kaveat. Nampaknya bahawa *prima facie* defendan mempunyai jawapan yang lengkap kepada tuntutan untuk relif spesifik oleh plaintif. Pihak-pihak tersebut terikat oleh doktrin *res judicata* daripada membangkitkan semula sesuatu isu yang telah diputuskan dalam prosiding yang lebih awal.

[Rayuan ditolak.]

Case(s) referred to:
Craig v. Kanseen [1943] 1 KB 256
Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 ***(refd)***
London and Clydesdale Estates Ltd v. Aberdeen DC [1979] 3 All ER 876 ***(refd)***
R v. Immigration Tribunal ex p Jeyenathan [1999] 3 All ER 231 ***(refd)***
Stewart Chartering Ltd v. C & O Managements SA & Ors [1980] 1 All ER 718 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 13 r. 6(1), O. 19 r. 7(1)

For the appellant - B Thangaraj (Nizam Bashir); M/s Bashir & Co
For the respondent - Hilary D'Cruz (TS Soon); M/s Rohani, Soon & Assoc

[Appeal from High Court, Melaka; Civil Suit No: 22-7-1997]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

This is a case in which the learned judge of the High Court set aside a judgment entered in default of appearance. The facts of immediate relevance to the entry of the judgment are but brief.

On 8 March 1997, the plaintiff (the appellant before us) purportedly served a writ on the defendant (the respondent in the appeal). No appearance was entered. A certificate of non-appearance was then filed. The plaintiff, acting under RHC O. 13 r. 6, took out a summons for judgment. This is because the foot of the writ carried a prayer for specific relief that fell outside those heads of claim in respect of which an *ex parte* judgment form may be filed in the usual way. In due course, judgment on the summons in default of appearance was entered against the defendant. Later, the defendant applied to set aside the judgment and the judge acceded to that application. The plaintiff then appealed to us.

The defendant relied on a number of grounds in support of its application to set aside the judgment in question. Some of these were procedural in nature and some substantive. The learned judge does not appear to have considered the substantive merits of the defendant's case in support of its application. He merely confined himself to procedural points. He held that the judgment was bad because the plaintiff had proceeded under the wrong rule of court. He was of the opinion that the plaintiff ought to have proceeded under RHC O. 19 r. 7(1) instead of O. 13 r. 6.

Counsel for the plaintiff has argued that the former rule of court applies only to cases where there has been default in the delivery of a pleading whereas the latter rule applies to cases where there is default of appearance. I think that the submission of counsel for the plaintiff is correct. But, it is does not advance his case. There are two principal reasons for this. The first of these is the historical background to the present litigation which I shall discuss later in this judgment. The second, I shall deal with straightaway.

At one point in the history of our procedural jurisprudence, our courts treated the observance of the rules of court as a matter of first importance. A perusal of the Malayan Law Journal will reveal cases in which an action or other proceeding terminated against a litigant because he or she failed to observe a particular rule of court. And there are judgments of judges of much learning and experience in which one finds statements stressing upon the importance of due observance of the rules of court. Indeed the law reports are replete with examples of cases in which an action or other proceeding has failed on procedural grounds.

Similarly, mandatory and directory provisions whether in the rules of court or other procedural legislation were interpreted in a straightjacket fashion. So, as a general rule, when a provision said "shall", it was regarded as being mandatory in effect, whereas if it said, "may", then it was treated as being merely directory. Non-compliance of the former rendered invalidated proceedings, but non-compliance of the latter did not. No attention whatsoever was paid to the consequences of non-compliance of such provisions. It did not matter, for instance, whether anybody was prejudiced by, or whether any injustice resulted from, the non-compliance in question.

The modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions is one of greater flexibility than that adopted heretofore. It is exemplified by the following passage in the judgment of Lord Woolf MR in *R. v. Immigration Tribunal ex parte Jeyenathan* [1999] 3 All ER 231. It is a case of the first importance. This is what the Master of the Rolls there said (at p. 236):

> An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see Wade and Forsyth *Administrative Law* (7th edn. 1994) p 255. Supperstone and Goudie *Judicial Review* (2nd edn. 1997) ch 4 and de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th edn, 1995) pp 265-271). Frequently the investigation involves doing no more than deciding the sense in which the word 'shall' has been used as part of a particular procedural requirement. As the word 'shall' is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance. Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement.

After referring to the speech of Lord Hailsham of St. Marylebone LC in *London and Clydesdale Estates Ltd. v. Aberdeen DC* [1979] 3 All ER 876 and quoting a passage therefrom, the Master of the Rolls continued as follows:

> Bearing in mind Lord Hailsham LC's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question). Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)
>
> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

This, I think, is the approach that should be adopted by our courts. In my judgment, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

The other ground relied on by the defendant in the court below relates to the service of the writ. It is a quasi-procedural point. I think I must explain why I say "quasi-procedural". The failure to properly serve the writ or other cause papers upon a defendant amounts to a breach of the fundamental rules of justice. It ordinarily renders an *ex parte* judgment obtained in reliance upon such service a nullity. The decision in *Craig v. Kanseen* [1943] 1 KB 256 illustrates the principle. In that case, the failure to properly serve a summons to proceed under a judgment was held to render an *ex parte* order made on that summons to be a nullity. Hence, what is at issue is a substantive right to be notified of the relevant process to enable a party to protect his interests. But the steps leading up to the

entry of a judgment or the making of an order may be essentially procedural. So when viewed as a whole, the point is partly substantive and partly procedural. Hence my use of the term "quasi-procedural".

The argument in respect of service was that the writ and other cause papers ought not to have been served on the defendant personally. It was said that they ought to have been served on the defendant's solicitors. The learned judge rejected this argument. Counsel for the plaintiff has argued before us that as there is no cross appeal, the defendant is not entitled to re-open this issue in the present appeal. With respect I do not agree with the conclusion of the learned judge on the point. Neither do I agree with the argument of counsel. Since the question of service is closely connected with the merits of the case, I will give my reasons on this part of the case at the appropriate place in this judgment.

I now turn to consider the history of the present litigation which, in my view, provides a complete answer to the plaintiff's complaints in the instant appeal. The subject matter of the present litigation is an agreement dated 3 April 1991. Under that agreement, the defendant agreed to sell two pieces of land to the plaintiff. It is the specific enforcement of the aforesaid agreement that the plaintiff seeks in his writ in the present action. The plaintiff had entered a caveat against the titles to the land in question for the purpose of protecting his interest. Later, the defendant terminated the sale agreement and took out proceedings to remove the plaintiff's caveat. It was by an originating summons (No 24-151-1995). The summons was heard and the High Court decided that the plaintiff had no caveatable interest in the lands on the footing that the defendant had properly terminated the sale agreement. It is to be emphasised that both sides were represented by solicitors. The plaintiff had annexed an unsealed copy of the writ in the present action to one of his affidavits delivered in the caveat proceedings. The writ was issued later. Although the plaintiff knew that the defendant was represented by solicitors, his solicitors proceeded to serve the writ and other cause papers on the defendant in person. It was pursuant to that service that the plaintiff entered judgment in default.

Based on the foregoing material, it was submitted before us by counsel for the defendant that the entry of the judgment in default amounted to an abuse of process. There is, I think, much force in this argument.

Now, it is true that the rules of court countenance the service of process upon a litigant in person. But it does not follow that in every case where there is due observance of a rule of court no abuse of process may ensue. A rule of court like any other provision may be the subject of abuse. And

it is the function and duty of the courts to be ever vigilant against this. An excellent example of a case of the prevention of an abuse of a rule of court is *Stewart Chartering Ltd v. C & O Managements SA & Ors* [1980] 1 All ER 718. In that case the chief clerk in the judgment room had declined to accept a default judgment form in the ordinary way. Robert Goff J however granted the plaintiff in that case leave to enter judgment in default despite the terms of O. 13 r. 6(1). He did so in order to prevent an abuse of the court's process.

The court's process may be abused by a litigant in any number of ways. It all depends on the facts and circumstances of each case. In *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533, 540 I had occasion to sum up the law on the subject:

> It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v. Doctor & Ors* [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become *dominis litis,* thereby preventing the defendant from obtaining vindication through a judgment of the court. In the last instance, the court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed (see *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124; *Castanho v. Brown & Root (UK) Ltd & Anor* [1981] AC 557).
>
> A fairly recent decision on the point is that of the English Court of Appeal in *Gilham v. Browning & Anor* [1998] 2 All ER 68. It was a case where the defendant's discontinuance of his counterclaim before the county court was held to be an abuse of process. It was there held that whether in a particular case there was an abuse would be a question of fact and degree.
>
> Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed.
>
> Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process.

In the present instance, the plaintiff, despite being aware that the defendant was represented by solicitors proceeded to serve the defendant personally. He knew that the caveat proceedings were on foot. His solicitors ought to have communicated with the defendant's solicitors in the caveat proceedings and found out whether they had instructions to accept service. There ought to have been no difficulty in doing this. Solicitors do it all the time. I would venture so far to say that the defendant's solicitors would in all likelihood have had instructions to accept service of the writ. After all the subject matter of the writ and the caveat proceedings was the same. The plaintiff no doubt did what he did in order to steal a march on the defendant.

Further, the judgment in default gave the plaintiff what he was certainly not entitled to have. The issue of the validity of the sale agreement had already been determined by the High Court in the caveat proceedings. It would appear that *prima facie* the defendant has a complete answer to the claim for specific relief mounted by the plaintiff in his writ. The parties were bound by the doctrine of *res judicata* from re-agitating an issue that had already been resolved in earlier proceedings.

So, looking at the case as a whole once again, I think that what happened here was unfair and unjust in more ways than one. The judge came to the conclusion that the default judgment ought to be set aside. I do not agree with all that he has said. But his decision is entirely correct. Any reasonable tribunal similarly circumstanced would have arrived at the same decision. At the end of the day it is a matter within the discretion of the judge. And I am able to say with confidence that he exercised it correctly.

The appeal is dismissed with costs. The deposit will be paid out to the defendant to account of his taxed costs. The order of the judge is affirmed.

My learned sister Siti Norma Yaakob and my learned brother Haidar Mohd. Noor JJCA have read this judgment in draft and have expressed their agreement with it.